No. 1488

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Missoula Division

JACKSON C. SAIN, HETTIE SAIN, ED RAY, JOSEPH H. McDONALD, MISSOULA COUNTY, TENNIE E. GREENOUGH, CLARA PIDGE, W. T. BURNETT, GEORGE CROMWELL, GLENN STICHT, G. W. LEAPHART, JOSEPHINE YOUNGQUIST, HARRY E. STETSON, A. M. ROGERS, I. E. PETERSON, H. E. STURM, MINNIE L. McCANN, A. L. KAGLE, ISRAEL Q. ROBERTS, WILLIAM J. JOHNSON, HORACE A. GREEN, PEARL GREEN, W. D. SATTERFIELD, MARGARET A. SATTERFIELD, E. F. ROTH, ELLEN R. WHITING, L. A. WAGONER, CHARLES E. LUCAS, CHARLES A. MARTINSON and FREDA MARTINSON, co-partners doing business under the firm name of MISSOULA ICE COMPANY, ORPHA MILLER TALBOTT, and RUSSELL H. MILLER,

Appellants, Plaintiffs Below,

vs.

THE MONTANA POWER COMPANY, A CORPORATION,

Appellee, Defendant Below.

Appellants' Brief

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APPELLANTS' BRIEF

I.

STATEMENT OF THE CASE

This suit is in equity. It involves the use of the waters of Rattlesnake Creek in Missoula County, Montana. The court obtains jurisdiction because of the

diversity of citizenship, appellants, plaintiffs below, being all citizens of Montana and appellee, defendant below, being a corporation organized and existing under the laws of the State of New Jersey; the matter in controversy exceeding, exclusive of interest and costs, the sum and value of Three Thousand Dollars.

Upon the 9th day of July, 1903, a judgment was rendered in the District Court of Missoula County, Montana, being Cause No. 1953, bearing date on that day, adjudicating the waters of said Rattlesnake Creek between appropriators and determining the respective rights, priorities, and amounts which the several appropriators were entitled to use and thus Rattlesnake Creek became an adjudicated stream as defined by Section 7128, Revised Codes of Montana, 1921. (Tr., 43-55, Ex. "A.") The judgment, though dated July 9, 1903, seems to be marked "Filed" in the month of July, 1904. Such manifestly was the result of an inadvertence or oversight in the office of the Clerk of the Court because the register of actions introduced in evidence (Tr., 142) shows that immediately after the date of the judgment, namely, July 3, 1903, a motion for a new trial was made, considered, and denied (Tr., 148); as we know, the motion for a new trial could not have preceded the entering of the judgment in the case. If it makes any difference at all whether the judgment was rendered upon July 3, 1903, or in July, 1904, then it must be apparent that the same was rendered upon the day it bears date. Appellants can see no material difference as to whether the rendition of this judgment

was the former, or the latter, date and hence will not discuss the point further.

Appellee in this action is the successor of the plaintiff in Cause No. 1953; appellants are the successors of many, though not all, of the defendants in Cause No. 1953. The respective interests of appellants and appellee, and that they are, respectively, successors to parties in Cause No. 1953 is fully established by proof and by agreement of counsel. (Tr., 65; Tr., 165.) In Cause No. 1953 the court made twenty-three separate findings of fact; in each such finding of fact there is awarded a right to some one or more of the parties, plaintiffs or defendant. Priority of rights runs in the numerical order, hence, precise date of appropriations need not be retained. Conclusions of Law in accordance therewith were also made.

Plaintiff in Cause No. 1953, predecessor of appellee here, was awarded the following rights (Tr., 80):

> 1. 946 inches April 1, 1866, *by what is called the Mill Ditch, for mechanical, power and other beneficial purposes, and that the same has been used by plaintiff and its predecessors in interest ever since, and that no part thereof has ever been abandoned.*
>
> 2. 160 inches November 16, 1868, *by what is called the original Higgins Ditch, and that no part of said appropriation has ever been abandoned.*
>
> 9. 348 inches May 1, 1881, enlarged the original Higgins Ditch—to 508 inches thereby making an additional appropriation of—348 inches—*and that no part thereof has ever been abandoned.*

While the rights of the several appellants are separate and several, for the purposes of this action the same may be considered as one group or a single right; so considered appellants succeed to the following decreed rights fixed in Cause No. 1953, to-wit:

45 inches of Right 5, Williams Ditch;
145 inches of Right 10, Hollenback Ditch;
50 inches of Right 16, Hollenback Ditch;
100 inches of Right 17, Effinger Ditch;
50 inches of Right 18, Niell Ditch;
248 inches of Right 20, Quast Ditch;
127.3 inches of Right 21, Cobban-Raymond Ditch;
55 inches of Right 22, Hamilton Ditch.

It is established by the pleadings and the admissions that, in addition to the Right 1, 2, and 9, directly involved here, appellee has also the following rights:

13½ inches of Right 3 for city water works purposes;
65 inches of Right 4, Fredline Ditch;
115 inches of Right 5, Williams Ditch;
46½ inches of Right 8, city water works purposes;
130 inches of Right 11, Federson Ditch;
645 inches of Right 14, city water works purposes;
50 inches of Right 19, Duncan right;
65 inches of Right 20, Quast Ditch;
142 inches of Right 21, Cobban-Raymond Ditch.
(Tr., 80-81.)

The entire flow of Rattlesnake Creek at low water time measures 1642.32 miners inches (Tr., 136) which is average flow. (Tr., 167.)

II.

THE PLEADINGS

The complaint alleges that Right No. 1 was appropriated through the Mill Ditch taking water from Rattlesnake Creek at its lower end and near the mouth of the creek, for water power and mill purposes, which use was continued down to and subsequent to the rendition of the judgment in Cause No. 1953; that Rights 2 and 9 were both appropriated through the original Higgins Ditch for irrigation, tapping Rattlesnake Creek about a mile above the mouth of Rattlesnake Creek; that these points of diversion are some distance below the points where the several rights of the plaintiffs have always been diverted. It is alleged that subsequent to the decree in Cause No. 1953, appellee's predecessors abandoned the appropriations 1, 2, and 9 and ceased using the water appropriated through these ditches, but that appellee's predecessors, without right, diverted an amount of water equal to the amount of these appropriations at a point higher up on the stream and in the vicinity of the places of diversion of the several appellants; appellants complain that water to supply the appropriations through the Mill Ditch and the original Higgins Ditch arose in the bed of the stream and along its course below appellants' several points of diversion and that, notwithstanding the diversions by the several appellants, there always was, and is water flowing in Rattlesnake Creek sufficient to supply the

Mill Ditch and original Higgins Ditch appropriations. In other words, that the priority of the Mill Ditch and original Higgins Ditch would not have interfered with the several appropriations of appellants because, notwithstanding such appropriations, there is still flowing in Rattlesnake Creek at the heads of the Mill Ditch and the original Higgins Ditch sufficient water to supply the appropriations for those ditches, and which water, when not diverted to supply the appropriations through those ditches, flows to waste to the mouth of the creek and into the Hellgate River. By assuming the right to divert the Mill Ditch and original Higgins Ditch appropriations at the higher-up point, marked on maps as "Dam," appellee, in low water time and when most needed by appellants, takes practically the entire flow of the creek to supply its needs, thus depriving appellants of the use of the water and at the same time the amount flowing in the creek below appellants' several points of diversion flows to waste past the head of the Mill Ditch and original Higgins Ditch. Appellants claim that the pretended and attempted change of point of diversion is injurious to them and causes them prejudice. (Tr., 34-41, Complaint, para. XII-XX.)

The answer admits that Rights No. 1, 2, and 9 were originally appropriated through, respectively, the Mill Ditch and original Higgins Ditch (Tr., 62-63, para. VI), and likewise that these waters were originally diverted and used through these ditches; defendant's Answer also asserts that after the original appropriations the defendant, desiring to divert all its water at a

single point of diversion, did change the place of diversion of these appropriations from the head of the Mill Ditch and Original Higgins Ditch to its dam, located and described in its Answer and by the testimony. In other words, it is established by the pleadings that these rights here complained of, namely 1, 2, and 9, though originally appropriated for the Mill Ditch and original Higgins Ditch and diverted for a long period of time through those ditches, were subsequently transferred to the point higher up on the stream above and in the vicinity of the point of diversion of the several appellants, and appellee, having affirmed the assertion that it had changed the points of diversion of these rights, asserts its right to continue to divert the water at the new point of diversion as superior to any right to the use of the waters of any of appellants. Appellee also pleads that it has acquired the right to continue this change of point of diversion because it has adversely asserted the right for a period exceeding the period of the statute of limitations and that defendant has expended substantial and large sums of money in perfecting its works for the profitable enjoyment of its enterprise of furnishing water to the City of Missoula, and appellants are barred and precluded by the statute of limitations and laches from maintaining this action. (Tr., 79-93.) Appellee claims that the change of point of diversion did not increase, but lessened, the burden upon the stream. (Tr., 85, para. V.)

III.

THE TESTIMONY

W. H. Swearingen prepared a map (Tr., 119, Ex. 1) of Rattlesnake Creek area showing in a general way the holdings of the several plaintiffs and their places of diversion of water from Rattlesnake Creek, showing, also, the original point of diversion through the Mill Ditch and the Higgins Ditch. These various points were shown to the witness by Will Cave, an old time resident of the community, familiar with the points from the early days (Tr., 116), and the "Dam" where appellee now asserts the right to make its diversion of the water originally diverted through the Mill Ditch and the Higgins Ditch respectively. (Tr., 117-119.) Appellee's Exhibit 6 (Tr., 179) is a map showing substantially the same things. There are no tributaries coming into Rattlesnake Creek below the "Dam" (Tr., 169) and the maps, Exhibits 1 and 6, show all the ditches leading from the stream. The "Dam" where appellee seeks to divert the water for distribution to the City of Missoula is approximately three miles up stream from the head of the Mill Ditch and two miles up stream from the head of the Higgins Ditch. (Tr., 180.) The irrigation ditches of appellants tapped the stream at points near the "Dam," some of them a short distance above and others a short distance below, Exhibits 1 and 6. The testimony clearly shows that the various diversions at, and in the immediate vicinity of, the "Dam" exhaust the entire flow of the stream dur-

ing the months of July and August. (Tr., 121; Tr., 128; Tr., 130; Tr., 162.) In the year 1926, and on account of the seeming encroachment of the water company upon the rights of the agricultural appropriators, a group of the agricultural appropriators placed a weir in the creek where the Mill Ditch takes out. (Tr., 121.) During the months of July and August of that year various measurements were made by their weir. At the time of such measurements, invariably, the stream was dry immediately below the "Dam," but that by reason of the water rising in the bed of the stream below the points of diversion of appellants and above the heads of the Higgins Ditch and the Mill Ditch, a substantial flow was measured over the weir. (Tr., 122; Tr., 126; Tr., 130; Tr., 167; Tr.,162.) The result, thus indicated by the measurements, is only illustrative of the condition every year. (Tr., 139; Tr., 163; Tr., 165; Tr., 137; Tr., 168.) The water flowing where the weir was placed went to waste, the same not being available for use by appellants and not actually used by appellee to supply any of its decreed rights. The weir installed was a ten foot weir (Tr., 126; Tr., 167) and the measurements indicated a flow of 4½ inches in depth over the weir, which would be 304 miners inches of water (Tr., 136) to as much as 7½ inches in depth of water going over the weir, which would exceed a flow of 600 inches, all of which water was in the bed of the stream at the place where the weir was installed and all of which flowed to waste. There was also always a substantial flow going through the Fredline Ditch constituting also water ris-

ing in the bed of the stream and amounting to as much as 250 inches (Tr., 280) and which would have been available to supply the Mill Ditch appropriation if such appropriation were still diverted through the Mill Ditch. (Tr., 171; Tr., 163; Tr., 137-138; Tr., 124-125.)

The entire flow of Rattlesnake Creek is necessary to supply the needs of the various appropriators and the entire flow is applied to beneficial uses, when available, and whenever the water is wasted, such wasting results in substantial damage and injury to appellants. (Tr., 169; Tr., 165.) In the year 1931, at the height of the irrigation season, the ditches of all the appellants were closed and the entire flow of the stream at the "Dam" diverted by appellee (Tr., 165; Tr., 162; Tr., 137) and thus the agricultural appropriators were deprived of the use of the water. One of the appellants testified to having entirely suspended his own farming during the year 1931 because of his water being shut off and of going to work out in another locality. (Tr., 165.) Partial deprivation is shown during earlier years by practically all the agricultural appropriators. There is no substantial dispute to any of this testimony, nor can it be successfully urged from the record in this case but that appellants would have received water from the stream if appellee would accept the water decreed for Rights 1, 2, and 9 at the heads of the Mill Ditch and Higgins Ditch, respectively.

Surveyor Ray (Tr., 136), at the instance of Tucker, upon August 7, 1924, made an exact and precise meas-

ure of the entire flow of the stream just above the "Dam" and found it to be 1642.32 miners inches of water. Witness Tucker explains (Tr., 167; Tr., 136) that the flow then was a normal flow for that time of year and that it was a low water point of the year. Appellee's superintendent, Christenson, testified to a minimum flow for the stream, in low water time, of 1400 inches. (Tr., 211.) This witness had made numerous measurements upon the stream and was thoroughly familiar with the volume of such flow. It is fairly established that 1600 miners inches is the approximate minimum flow of the stream.

Other than the water rights decreed for the Mill Ditch and the Higgins Ditch, appellee owns the following decreed rights:

Right 3, 13½ inches, city water works purposes;
Right 8, 46½ inches, city water works purposes;
Right 14, 645 inches, city water works purposes.

A total of 705 inches. These rights were all decreed in Cause No. 1953 to appellee's predecessor for water works purposes and, at the time of the decree, were being diverted at a point just below where the "Dam" is now located. Appellee has Rights Nos. 3, 8, and 14 and the unquestionable right to divert the same at the "Dam." The aggregate of these rights being 705 inches, and there is no dispute nor contest of appellee's right to divert the amount of these three appropriations for water works purposes at the "Dam." Taking then the normal flow during low water period, say during the month of August, to be 1600 inches, and the normal

needs of appellee to be 700 inches, there remains at the dam 900 inches to be used to satisfy appellants' appropriations; these aggregate 820 inches. The result shows water sufficient to supply the needs of all parties. At the same time there is an excess of flow at the dam, which, together with the water rising in the bed of the stream, is available to meet any need at the head either of the Mill Ditch or the original Higgins Ditch. Contrast this with the undisputed situation occurring in 1931 when appellee, claiming the right to change its point of diversion, took No. 1, Mill Ditch, and No. 2 and No. 9, original Higgins Ditch, or so much thereof as they chose to take, at the dam, thus exhausting the stream and entirely depriving all the appellants of the use of the water. At the same time, more than 600 inches was flowing to waste to the mouth of the stream, or out the Fredline Ditch. Clearly, during any normal year there is not sufficient water at the dam to supply appellee's claim to divert at that point Right 1, 946 inches; Right 2, 160 inches; Right 3 and 8, 60 inches; Right 9, 348 inches; Right 14, 645 inches; a total of 2159 inches, and at the same time meet the decreed rights of appellants, aggregating 820.3 inches. Yet, during such years there will be 600 inches, or thereabouts, flowing to waste at the head of the Mill Ditch, benefiting no one. But for appellee's asserted right to change its place of diversion, there would be sufficient water at the dam to supply its water works appropriations, 705 inches, and also appellants' appropriations, 820.3 inches, and a surplus to satisfy original Higgins

Ditch and Mill Ditch appropriations rising in the bed of the stream above those ditches. Thus, it is conclusively shown that the change in the point of diversion resulted in prejudice to the agricultural appropriators. The "Dam" is 305 feet higher in elevation than the head of the Mill Ditch. (Tr., 300.)

IV.

At the conclusion of the trial, the request was made and leave granted to each side to file a request for Findings of Fact and Conclusions of Law (Tr., 302) and the Findings requested by appellants are set forth (Tr., 302) while those requested by appellee are set forth (Tr., 319), and the cause was submitted on October 26, 1933. The decision of the court below was rendered upon February 5, 1934 (Tr., 97) and the Facts are found to be as follows:

> Sain, et al., vs. Montana Power Company, No. 1488, Federal Supplement 792.
>
> "Ignoring nonessentials of strategy, camouflage, and nuisance-value, the gist of the case is whether defendant's change in place of diversion of water inflicts substantial injury on any plaintiff.
>
> The evidence discloses appropriations by defendant in amount 1,184 inches prior to any plaintiff's, 169 inches more, prior to any plaintiff's save one of 45 inches, 775 inches more, prior to any plaintiff's save the aforesaid and one of 145 inches, and some subsequent unnecesary to detail.
>
> The change involved, made in 1902, is from the Mill ditch and the Higgins ditch, both below plain-

tiffs, to a dam 1¾ miles above the Mill and 100 feet higher, and above most of plaintiffs.

The defendant is a public utility and now diverts no water save at said dam and to serve the city of Missoula. It appears defendant has not diverted more than 1,112 inches, or 6 inches more than its appropriations by the ditches aforesaid and prior to all plaintiffs.

Above the dam defendant has eight reservoirs, but claims nothing here by reason of any excess water stored. The dam obstructs all flow of the stream save overflow more or less intermittent and which varies as varies the flow and diversion by defendant. Likewise varies the flow below the dam.

Taking the testimony for it and particularly that of defendant's superintendent, when defendant sometimes diverts all flow, the surface flow runs off and the bed of the creek dries to a short distance above the Higgins ditch. There and below, however, the usual surface flow emerges, and always affords a surface flow of water at the head of at least the Mill ditch, in amount sometimes 340 inches.

In effect, the subsurface operates as a bypass around plaintiffs' places of diversion, and as a tributary or accretion to the stream above defendants before the change. This water not available to defendant at the Mill ditch if not at the Higgins ditch, is by it permitted to waste and its equivalent taken at the dam.

And this consequence of the change is the grievance and injury of which plaintiffs complain. That complaint is justified, grievance and injury real and substantial is clear, plain as a pike staff.

A single illustration suffices.

Assume a flow of 1,000 inches at the dam, defendant's need and diversion 700 inches, and over-

flow 300 inches. The last enters the subsurface and only emerges where unavailable to any plaintiff but available to defendant. Obviously, had defendant not changed diversion from the ditches to the dam, the 1,000 inches in surface and subsurface flow adown the stream would supply 300 inches to plaintiffs and 700 inches, its need and so the limit of its right, to defendant at the ditches. Therefore, at that time or any other of shortage, in just apportionment this wasted water is to be charged against defendant, its diversion at the dam limited to its need (in general, always the limit of a water right when others need water, however greater the appropriation), less any substantial flow at the head of the Higgins and/or the Mill ditch, the deduction not to exceed the extent of defendant's resort to the priorities by said ditches obtained."

V.

QUESTIONS INVOLVED

1. At the bringing of the action, the primary questions involved were:

(a) Are appellants injured by the attempted change of point of diversion; and

(b) Notwithstanding such injury, have appellants, by laches or by the running of the statute of limitations, lost their right to object to the change of point of diversion?

If it can be said that there was any substantial conflict in the evidence as to such questions, all such conflict is set at rest by the decision of the court below. The decision clearly and unqualifiedly finds the facts in favor of appellants. Not only must it be said that the

decision below is sustained by substantial testimony, but appellants urge such findings are the only reasonable result to be gathered from the testimony and the same are overwhelmingly supported by the testimony produced upon the trial.

2. After finding the facts thus clearly in favor of appellants, the court below continuing found and it is true that in 1903 a decree was rendered in the State court of the county where this stream is situated settling priorities in time and amount and enjoining each party thereto from trespassing upon the right of the other; that since the rendition of such decree, the court rendering the same still maintains and exercises jurisdiction to enforce and execute such decree by its officer (water commissioner) to apportion the water and supervise its use. The court decides that appellants' rights must be vindicated, if at all, by the State court and that appellants may not seek an injunction in this court but that the acts complained of by appellants, if and to the extent the same may be wrongful, justify a penalty on the appellee from the state court. In effect, that the relief sought by appellants in this action is only such as may be extended by the state court where the water rights in question were adjudicated. The court below further decided that, by virtue of having adjudicated the water rights upon Rattlesnake Creek by the decree of 1903, the state court obtained exclusive jurisdiction over the subject-matter of the action and should proceed to the determination of such water rights without interference by any other court;

that, for this court to enter a decree in this case upon the merits, would constitute an invasion of the jurisdiction of the state court. The court ordered this case dismissed.

VI.

SPECIFICATION OF ERRORS

1. The court erred in rendering the decision of February 5th, 1934, and dismissing appellants' Bill of Complaint.

2. The court erred in finding and holding that the court is without jurisdiction in the cause.

3. The court erred in finding and holding that the State Court and not the United States Court has jurisdiction to hear and determine the matters at issue as shown by the pleadings in the cause.

4. The court erred in finding and holding that to entertain this suit and decide the same in accordance with justice and the rights of the parties would constitute an invasion of the jurisdiction of the State Court.

5. The court erred in finding and holding that appellants may not have an injunction and restraining order in this cause as prayed for in the complaint in this cause.

6. The court erred in finding and deciding against the appellants in this action and in favor of the defendant.

7. The court erred in granting to the appellants the injunction and relief prayed for in the complaint.

8. The court erred in not finding each of the proposed findings of fact that were requested by the appellants, to be true, the same being numbered Findings of Fact requested by appellants numbered 1 to 19 (Tr., 302-315), inclusive, and the court erred in failing to find and decide each and all the conclusions of law requested by appellants numbered I to VII, inclusive (Tr., 315-319), in favor of appellants.

9. The court erred in not finding and deciding that appellee herein has the legal right to divert from Rattlesnake Creek at the place designated on the maps introduced in evidence in this cause as "Dam" to the extent that it has need therefor, the water awarded and adjudicated to its predecessors in the decree in Cause No. 1953 by Rights Nos. 3, 8 and 14 of the Findings of Fact in said decree and within the limits and according to the priorities prescribed in said decree, for the purpose of supplying the city of Missoula and its inhabitants with water, but appellee does not have the right to divert at said place designated or said maps as "Dam" water to satisfy any of the other decreed rights included or adjudicated by the decree in Cause No. 1953 to its predecessors, whenever appellants have need for such water.

10. The court erred in not finding and deciding that the attempt by appellee and its predecessors in interest to change the place of diversion or Right No. 1 in the Findings of Fact in the decree in Cause No. 1953 from the head of the Mill ditch to the "Dam," and likewise the attempt of appellee and its prede-

cessors in interest, to change the place of diversion of Right No. 2, in the Findings of Fact of the decree in Cause No. 1953, from the head of original Higgins ditch to the "Dam"; and likewise the attempt of appellee and its predecessors in interest to change the place of appropriation of Right No. 9 in the Findings of Fact of the decree in Cause No. 1953 from the head of original Higgins ditch to the "Dam" are, and each of said attempts is, injurious to appellants, and said attempts cause, and each of said attempts causes, damage and prejudice to appellants and all of appellants.

11. The court erred in not finding and deciding that appellants are entitled to an injunction restraining appellee from making the changes in place of diversion of the water rights described in the complaint in this action and referred to in these findings, or making either or any of such changes, whenever appellant or any of appellants shall be unable to obtain water at his or their point of diversion on account of appellee's diversion, said appellant or appellants then having need for such water. Particularly appellants shall be entitled to enjoin and restrain appellee from changing the point of diversion of Right No. 1 of the Findings of Fact in the decree in Cause No. 1953 from the head of the Mill ditch to the "Dam" and shall be entitled to enjoin and restrain the appellee from changing the point of diversion of Right No. 2 of the Findings of Fact of the decree in Cause No. 1953 from the head of the original Higgins ditch to the "Dam," and

shall be entitled to enjoin and restrain appellee from changing the point of diversion of Right No. 9 of the Findings of Fact of the decree in Cause No. 1953 from the head of original Higgins ditch to the "Dam," at any time whenever appellants or any of appellants have need for the water to satisfy their own appropriations and are unable to obtain the water to satisfy their own appropriations because of appellee's diversion thereof.

12. The court erred in not finding and deciding the claim of appellee to have the right to change the point of diversion of the water awarded and decreed to its predecessors in interest in Findings 1, 2 and 9, from the head of the Mill ditch and original Higgins ditch to the "Dam," is wrongful and without authority of law and is invalid, being injurious to appellants, and appellee shall not have the right to make change of the point of diversion of said water rights, nor any thereof, whenever appellants, or any of appellants have need for such water and are deprived of the water on account of any diversion of water by appellee.

13. The court erred in not finding and deciding that the appellants were not guilty of laches, either in the commencement of their suit, or in the prosecution thereof, and that the appellants' right of action set forth in the pleadings herein against the appellee is not barred by laches.

14. The court erred in not finding and deciding that the appellants' action was instituted in good time and is not barred by the statute of limitations.

15. The court erred in not finding and deciding the issues herein in favor of appellants and against appellee.

There is appended to this brief the Statutes of Montana relating to water rights referred to herein.

VII.

ARGUMENT

SPECIFICATION OF ERRORS 8, 9, 10, 11, 12

Change of Point of Diversion

Section 7095, Revised Codes of Montana, 1921, gives to an appropriator the right to change the place of diversion *if others are not thereby injured.* If injury or prejudice result from the change of point of diversion, such change will not be permitted.

Maclay vs. Missoula Irrigation District, 90 Mont. 344, 3 Pac. (2d) 286, Para. X;

Cassard vs. Noies, 18 Mont. 216, 44 Pac. 959;

Head vs. Hale, 38 Mont. 302, 100 Pac. 222;

Carlson vs. City of Helena, 43 Mont. 1, 114 Pac. 110.

Unless sustained in law, the assertion by appellee of the right to change the point of diversion constitutes an infringement of the rights of appellants and justifies the issuance of an injunction.

Hanson vs. Larsen, 44 Mont. 350, 120 Pac. 229.

If not abandoned, and to the extent that the same are not abandoned, it may be conceded that decreed

Rights 1 and 2 are senior to any of the decreed rights of appellants. With the same qualification, it may be conceded that right 9 is superior to any decreed rights of appellants, except a portion of 5 owned by some of appellants. The pleadings and admissions of the parties and the uncontradicted evidence show that right 1 was appropriated and originally diverted from the stream through the Mill Ditch and Rights 2 and 9 were appropriated and originally diverted from the stream through the original Higgins Ditch and that these ditches tapped the creek at points below the several points of diversion of appellants; that long subsequent to the dates of the respective appropriations through the Mill Ditch and original Higgins Ditch, appellee and its predecessors abandoned both the Mill Ditch and original Higgins Ditch and assumed to change the place where the water for these appropriations was to be diverted to a point higher up on the stream and in the vicinity as the several places of diversion of appellants.

2nd. Some slight amount of testimony was offered tending to show a smaller volume than 1600 inches in some years in the fore part of August, the extreme low water period; likewise, some small amount of testimony tending to show that the creek at the street crossing above the head of the Mill Ditch, during the same period of the year, has been known to be dry. Little importance may be attached to this testimony; notwithstanding there may in the future come years of such drought that water will cease to rise in

the bed of the creek, and when the entire flow will be much less than the normal flow shown by the testimony, and yet, because such extreme conditions may be possible in widely separated years, perhaps once or twice in a lifetime, appellants are not to be denied relief for the greatly more numerous normal years to which they are entitled. Judging the future by the past, it is fair to estimate that for every drought year when the minimum flow will be less than 900 inches, there will be nine years when the minimum flow will approximate 1600 inches. During these normal years when the water flowing at the dam will approximate 1600 inches there will be sufficient to supply appellee's city water works appropriations of 705 inches, appellants' appropriations of 820 inches and a surplus going down the stream to add to the natural accretion so as to deliver water at the heads of the original Higgins Ditch and Mill Ditch to satisfy the earlier priorities of these ditches. We repeat, that this case should be decided upon the rights of the parties as such rights are likely to be determined by their conditions and their needs during the low water period of normal years. The likelihood that in the future years there may come such extreme droughts that no water will be available to satisfy appellants' appropriations ought not to prevent relief being extended to appellants for the greatly more numerous normal years when, if the water be distributed as provided by law, there will be sufficient to satisfy appellants' appropriations.

3rd. Appellee's counsel seem to suggest that the

amount of water rising in the bed of the stream above the head of the Mill Ditch and going to waste is only the amount measured in the weir. This measurement varied at different times from showing a depth of four inches on a ten foot weir to showing a depth of seven inches. A four inch depth of water on a ten foot weir measures 270, approximately, miners inches, while a seven inch depth figures 600 miners inches, approximately. To this amount should be added the flow in the Fredline Ditch running from 160 to 250 inches. This water in the Fredline Ditch, like the water in the creek bed, was all water rising below the dam and upon demand must be delivered into the Mill Ditch. That this water, in almost every year when anyone made observations, rose below the dam does not admit of argument. Engineers engaged by appellants measured it and appellants observed it; appellee's engineers observed and measured. That the measurements made by appellee's engineers were less than those made by appellants does not constitute proof of the incorrectness of appellants' measurements; it only shows that the amount varies at different times and under different conditions, but that *at times* the conditions pleaded by appellants actually exist and appellants' rights are to be fixed accordingly.

4th. Appellee's counsel suggest also that the right to make a change of point of diversion was acquired by the notice of appropriation, the record of which was offered in evidence, Ex. 13 (Tr., 243), and that in the decree in Cause No. 1953, the right to

change the point of diversion is expressly granted and recognized. These suggestions are not borne out by the record. Exhibit 13, which is record of water right notice and bears date July 26, 1887, shows that shortly prior to the date of the instrument Missoula Water Works and Milling Company made an appropriation of water for city water works purpose. In this document the appropriators refer to a prior appropriation of date November 16, 1868, and undoubtedly referring to Mill Ditch, Ex. 11 (Tr., 236), and an enlargement of that appropriation including perhaps original Higgins Ditch, which are referred to in Ex. 12. This latter appropriation also refers to a diversion originally made through the Higgins Ditch in 1871 for water right purposes. In the amended Complaint in Cause No. 1953, and upon which the case was tried, appellee's predecessor claimed various rights aggregating a total of 4200 inches from the years 1864 and 1868, the purposes of such appropriations being *for mechanical, agricultural, domestic and other useful and beneficial purposes.* The complaint seeks adjudication of plaintiffs' rights based upon these earlier appropriations, but suggest no change of point of diversion. To the amended complaint the several defendants answered denying the alleged appropriations and making issue thereof; these answers each, likewise, affirmatively alleged that the original appropriation of plaintiff, made for furnishing power for a grist mill (referring, no doubt, to the Mill Ditch) had been abandoned except for the use of 100 inches only. The

proof at this trial shows beyond argument that both the Mill Ditch and the Higgins Ditch were in actual use for not less than two years after the trial of Cause No. 1953. Upon these issues in Cause No. 1953, the court found as facts: (1) The appropriation of 946 inches, Mill Ditch, for mechanical, power, etc., purposes, the continuous use thereof to that time *and that no part thereof had ever been abandoned;* (2) and a like finding as to the Higgins Ditch appropriation; in fact, the water commissioner's report as late as 1906 shows distribution by the water commissioner of the Higgins Ditch appropriation to the Higgins Ditch and its use for agricultural purposes and the payment of the water commissioner's assessment by the ditch owner for the water distributed for the purpose; (3) an appropriation of 13½ inches for city water works purposes April 1, 1871; an enlargement thereof April 1, 1881, for city water works purposes 60 inches; and, No. 14, further new construction and appropriation for the same purpose, 645 inches June 1, 1887. Thus by every reasonable, fair intendment, the decree found upon the issues presented and the result is clear that no right was given to appellee's predecessors to change either the Mill Ditch or the Higgins Ditch appropriation to divert the same higher up upon the stream, the proof being clear that when Cause No. 1953 was upon trial in 1902 there was the water actually flowing to satisfy the appropriations in both Mill Ditch and Higgins Ditch. The expressed finding against the abandonment of such appropriation was sustained. Likewise, the court in Cause No. 1953 cannot be deemed

to have decreed or granted a change in place of diversion when at the very time of the trial of No. 1953 the water was still being diverted at the point of original appropriation. On the other hand, the various appropriations by the predecessors of the plaintiffs in Cause No. 1953 are readily reconciled with the court's findings in Cause No. 1953. We know that claims to water in water right suits invariably greatly exceed awards of water decreed. Exaggerated demands are invariably expected but the awards made are based upon the testimony and not upon the demands. So when plaintiff in Cause No. 1953 was awarded Right 1, 2 and 9 for the Mill and Higgins Ditch, we must indulge the presumption that these appropriations in the amounts awarded were sustained by testimony. Likewise, awards of 13½ inches No. 3, 46½ inches No. 8, and 645 inches No. 14 for city water works purposes must be assumed to be in accord with the testimony produced. If it had been the fact that at the time of such trial the Mill Ditch appropriations were then being diverted at the dam the court would not have awarded 945 inches for the Mill Ditch and would not have further found *that no part thereof has ever been abandoned.*

5th. The diversion at the dam and additional works there constructed and referred to in the notice of water right, Ex. 13, even though taking water formerly diverted through the Mill Ditch, constituted a new appropriation of the date of the new construction.

Featherman, et al. vs. Hennessy, et al., 43 Mont. 310, 115 Pac. 985.

The court in Cause No. 1953 manifestly so concluded and gave the appropriator 645 inches of date June 1st, 1887, for city water works purposes, Right 14. The diversion for city water works purposes made in the year 1871 and referred to in the notice of location, Ex. 12, and the additions and enlargements thereof, likewise referred to in Ex. 12, were not disregarded by the court in the trial of Cause No. 1953 but Rights No. 3 and 8 were given on account thereof. The suggestion is made that by the statute of 1885 the right to change the point of diversion is given, but the Section in question, being Section 1251, Page 995, Compiled Statutes of Montana, 1887, is identical with the statute now and referred to by the Supreme Court of this state. In effect, the point of diversion may be changed *if others are not thereby injured,* but when the change causes injury to another then, as stated in Featherman vs. Hennessy above, it constitutes a new appropriation. Thus it is apparent that all the issues presented to the court in Cause No. 1953, and while exaggerated claims were cut, as they should have been, to conform to the needs of the appropriators, still rights were granted for all appropriations of which we now have knowledge. In the absence of any record whatever to bear out the claim, this court ought not to be asked now to assume, a wholly speculative assumption, that other issues were passed upon and other rights extended not apparent in the decree in Cause No. 1953, Sloan vs. Buyers, 37 Mont. 503, where the

court, quoting with approval from the Supreme Court of New Jersey, says:

> "Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. . . .
>
> "A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it includes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law given so conclusive an effect to matters adjudicated. And this is the principal reason why judgments are not estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants."

Freeman on Judgments, 5th Edition, Volume I, Section 76:

> "It is always proper to consider what the judgment should have been, since it will be 'presumed that the court intended to adjudge correctly in law upon the facts of the case,' and of two possible interpretations of the language of the judgment, that one will be adopted which makes it correct and valid, in preference to one which would make it erroneous."

Gans and Klein Investment Company vs. Sanford, 91 Mont. 512:

> "As with other documents, the legal operation and effect of a judgment must be ascertained by

construction and interpretation of it. The legal effect is that which governs. Judgments are to have a reasonable intendment; where a judgment is susceptible of two interpretations the one will be adopted which renders it the more reasonably effective and conclusive and which makes the judgment harmonize with the facts and law of the case.

"A decree will not be construed so as to result in positive wrong where that result can possibly be avoided."

21 Corpus Juris, Page 689:

"A decree will not be construed so as to result in a positive wrong where that result can possibly be avoided."

For appellee to ask this court to find that it was awarded the right in Cause No. 1953 to change the point of diversion of the Mills and Higgins Ditch appropriations is not only contrary to the positive rights extended to those ditches on account of water actually flowing in those ditches at the very time Cause No. 1953 was upon trial, but is also contrary to the express provision of Section 10561, which provides:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

The appellee introduced in evidence the proceedings in the Kemp condemnation suit (Tr., 271). We assume this evidence was offered for the purpose of tending to show that prior to the trial of Cause No.

1953, appellee intended to and was preparing to change its place of diversion from where it had been near the Feddersohn barn yard to a point higher up on the stream and where the present dam is situated.

Appellee's testimony very clearly showed that this change of place of diversion was made principally, if not solely, to avoid the contamination of its water by refuse from the Feddersohn cow yard. Appellee's evidence indicated clearly that in the spring time, especially, refuse from the cow barn yard would seep into the water and be carried to the reservoir.

There was nothing in this change of place of diversion which could or would in any manner lead the appellants' predecessors to believe that the appellee's predecessors contemplated using the water of the Mill ditch or Higgins ditch at the new dam. This change was entirely consistent with the idea that the water company, desiring to avoid the contamination of refuse from the barn yard, decided to change the place of diversion of its rights Nos. 3, 8 and 14 to the place where it constructed its new dam, being the place where the present dam is situated.

It will, of course, be borne in mind that neither Kemp nor his successors were parties to this action.

We believe that it very clearly appears that at the time of the signing of the decree in Cause No. 1953, water was being used by the appellee's predecessors through both the Mill Ditch and Higgins Ditch. The decree expressly finds that no part of the water decreed to these ditches had been abandoned. Any change in

the place of diversion *or any change of the use* of the water in either ditch would of necessity result in injury and prejudice to the predecessors of appellants in this action.

The language of the Supreme Court of Montana in the case of Galiger vs. McHulty, 80 Mont. 339, 260 Pac. 401, is very pertinent in these circumstances. The court said on page 357:

> "It is settled law in this state that an appropriator may change the place of diversion and change the use of the water (Thomas v. Ball, 66 Mont. 161, 213 Pac. 597), but such a change cannot be made to the prejudice of subsequent appropriators (Head v. Hale, 38 Mont. 302, 100 Pac. 222; Carlson v. City of Helena, supra; Lokowich v. City of Helena, supra). But an appropriator cannot be permitted to use the water for the purpose for which it is appropriated, and then, in the interims when not continually used by him, sell the same for use by other persons. The supreme court of Montana, in considering this question, used this language: 'It has been held that an appropriator of water may change the use of his appropriation from one purpose to another, (Meagher v. Hardenbrook, 11 Mont. (385) 381, 28 Pac. 451, and cases cited), but it has never been held in this state (nor are we cited to like holding elsewhere) that after an appropriator has used the water sufficiently to answer the purpose of his appropriation, he might take the waters of the stream remaining, which he could not use for the purpose of his appropriation, and sell it to other parties, thereby depriving subsequent appropriators of their right to use the same.' (Creek v. Bozeman Waterworks Co., 15 Mont. 121, 131, 38 Pac. 459; see, also Tucker v. Missoula Light & Water Co., 77 Mont. 91, 250 Pac. 11.)"

SPECIFICATION OF ERRORS 13, 14

Adverse Possession and Laches

6. Appellants respectfully urge that the pleading in this case falls far short of showing that appellants' right is barred by any limitations of the statutes or by laches. Likewise, the testimony wholly fails to support any such claims. We invite the court's attention to the case of:

Zosel vs. Kohrs, 72 Mont. 564, 234 Pac. 1089, cited with approval in St. Onge et al. vs. Blakely, 76 Mont. 1. The Supreme Court of Montana in the Zosel case lays it down as a fundamental rule that a decreed user from an adjudicated stream, such as appellee here, will be presumed to be taking water which it diverts pursuant to the decree, unless and until such user repudiates the decree and expressly gives notice to other users of such repudiation. To constitute a sufficient pleading of right by prescription it is incumbent upon the pleader to show a taking of the water when the rightful owner has need for it; and invasion of the right of the true owner. In case the true owner, at the time of such invasion, would not have need for the water, then there would be no actual invasion of his right and no initiation of the statute of limitations, "and it is only when it becomes so scarce that all of the parties cannot be supplied that an appropriator by taking that which by priority belongs to another can be said to initiate an adverse use." To establish a right by adverse possession the pleader must show

"that during the entire statutory period her invasion of the rights of the defendant were such as to give them, or some of them, a cause of action against her." Citing:

Smith vs. Duff, 39 Mont. 374;
Chessman vs. Hale, 31 Mont. 577;
Boehler vs. Boyer, 72 Mont. 472;
Talbott vs. Butte City Water Company, 29 Mont. 17;
Norman vs. Corbley, 32 Mont. 195.

He who asserts right by adverse possession has the burden of pleading and proving such right.

Stagg vs. Stagg, 90 Mont. 180.

7. In the light of these well-established rules, let us briefly analyze the situation as disclosed by the testimony in this case. Appellee had been decreed 60 inches of water for city water works purposes by Rights Nos. 3 and 8 in Cause No. 1953 and an additional 645 inches for the same purposes by Right No. 14. For each of these appropriations it fairly appears that the appropriator constructed substantial improvements upon the stream by which to divert and use the appropriation. Nobody claims and nobody has pleaded nor testified that the water of the creek ever reached so low a stage as to cut off Right No. 14 nor any part of it, nor any prior right. It seems, in fact, conclusively established that with the possible exception of two or three very brief periods there has al-

ways been sufficient water to supply Right No. 14 and prior rights throughout the entire history of the Rattlesnake. All users under decree were warranted in assuming that all appropriators *in taking the water from the streams, did so pursuant to the provisions of the decree,* Zosel vs. Kohrs, supra; also it is true that the presumption will be indulged that appellee and its predecessors did not intend to violate the decree, but it seems fairly apparent in this case that appellee and its predecessors did not violate the decree, but on the other hand, appellants and their predecessors received the water awarded to them, respectively, by the decree. From the time of the decree to the year 1931, with only slight interruptions, the appellants and their predecessors lived upon their farms, irrigated extensively, developed their lands and grew crops in abundance. From the unimproved area found by the first settlers, the locality has been developed by the use of the water of Rattlesnake Creek in the irrigation of the lands, to a settled, highly improved, prosperous community. This negatives the thought of an adverse use for city water works purposes of Rattlesnake Creek flow. No witness negatived such use of the water for irrigation although annoying encroachments, no doubt, occurred; all agree that in 1931 the previous vague assertions of right by appellee became outspoken proclamations. For the first time appellants then were made aware of the adverse claims, appellee then took the entire flow of the stream with the result of a complete loss of crops to appellants. Then for the first time, no

doubt, the right to bring this action became apparent. Under such circumstances, there is little foundation for the claim that appellants' action is barred by the statute of limitations.

8. The answer pleads that appellants' cause of action is barred by Section 9041, which provides a limitation of five years. This section is one intended to cover cases not particularly provided for by previous statutes. Appellee pleads no other statute of limitation. But a water right is real property, and an adverse title thereto could not be established short of the ten year period prescribed by Section 9015.

Boehler vs. Boyer, 72 Mont. 472, 234 Pac. 1986;

Wiel on Water Rights, Vol. 1, Sec. 583;

Smith vs. Duff, 39 Mont. 374, 102 Pac. 981.

The open, notorious, exclusive, uninterrupted use of water under claim of right is not sufficient to constitute an adverse user unless it is shown that the one against whom the adverse claim is asserted had need for the water and was actually deprived thereof.

In the case of Smith vs. Duff, 39 Mont. 374, the court said on page 378:

> "Because of the nature of the right, the elements constituting it must be proven satisfactorily and unequivocally; and no doubtful inference will suffice. The right by adverse user, or prescription, is acquired, in some measure, by an invasion of the rights of others—it bears a sort of kinship, by refined descent to the 'possession by bow and spear' of an earlier time; it is based upon a posi-

tive assertion of right in and by the water user in derogation of the rights of everyone else. In order to constitute an ownership by adverse user, say the authorities, the use must have been open, notorious, continuous, adverse and exclusive under a claim of right for the statutory period, which in this state is now ten years. (See Talbott v. Butte City Water Co., 29 Mont. 17, 73 Pac. 1111, and authorities cited.) While the authorities use both the words 'open' and 'notorious,' the use of either would seem to be sufficient, as they are practically synonymous when used in this connection, as inspection of the dictionaries will show. We advert to this because of the contention of counsel respecting the pleadings. Because of the conclusion to which we have come, we do not make further mention of the pleadings.

It is essential that the use be shown to have been adverse. Proof of the mere use of the water during the statutory period is not sufficient. It is necessary that during the entire period an action could have been maintained against the party claiming the water by adverse user by the party against whom the claim is made. (Talbott v. Butte City Water Co., supra; Chessman v. Hale, 31 Mont. 577, 79 Pac. 254, 68 L.R.A. 410; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; Watts v. Spencer, 51 Or. 262, 94 Pac. 39.) In the case last cited, Watts v. Spencer, the supreme court of Oregon said: 'The acts by which it is sought to establish the prescriptive right must be such as to operate as an invasion of the right of the person against whom the prescriptive right is asserted, and will give cause of action in his favor. (Long on Irrigation, sec. 90.) No adverse user can be initiated until the owners of the superior right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded. (Wimer v. Simmons, 27 Or.

1, 50 Am. St. Rep. 685, 39 Pac. 6; North Powder Co. v. Coughanour, 34 Or. 9, 54 Pac. 223; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546; Boyce v. Cupper, 37 Or. 256, 61 Pac. 642.)' See also, Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. 334."

9. In the same manner, why should appellee be permitted to assert that appellants are guilty of laches? The rule is stated in 21 C. J. 221, Par. 219, as follows:

"But mere delay in asserting a right does not *ipso facto* bar its enforcement in equity, by the great weight of authority, unless the case is barred by the statute of limitations. To constitute a defense, the delay must have been such as practically to preclude the court from arriving at a safe conclusion as to the truth of the matters in controversy, and thus make the doing of equity either doubtful or impossible, as through loss or obscuration of evidence of the transaction in issue, or there must have occurred in the meantime a change in conditions that would render it inequitable to enforce the right asserted, or, as commonly phrased, the delay must have worked injury, prejudice or disadvantage to defendant or others adversely interested, or plaintiff must have abandoned or waived his right, or acquiesced in the assertion or operation of the adverse right, or lost his own right by estoppel, or sufficient time must have elapsed to create or justify a presumption against the existence or validity of plaintiff's right, or a presumption that if plaintiff was ever possessed of a right, it has been abandoned or waived or has been satisfied, or that in consequence of the delay the adverse party would be inequitably prejudiced by the enforcement of the right asserted."

And in the First State Bank vs. Mussigbrod, 83

Mont. 68, 271 Pac. 695, the court, at page 89, spoke of the rule regarding laches, as follows:

> "Plaintiff assigns error on the court's finding that the interveners were not guilty of laches in asserting their rights, and contends that evidence warrants a finding of laches barring recovery.
>
> Plaintiff relies chiefly upon the declarations of this court found in Riley v. Blacker, 51 Mont. 364, 152 Pac. 758, that 'laches means negligence in the assertion of a right; good faith and reasonable diligence only can call into activity the powers of a court of equity, and, independently of the period fixed by the statute of limitations, stale demands will not be entertained or relief granted to one who has slept upon his rights. Considerations of public policy and the difficulty of doing justice between the parties are sufficient to warrant a court of equity in refusing to institute an investigation where the lapse of time in the assertion of the claim is such as to show inexcusable neglect on the part of the plaintiff, no matter how apparently just his claim may be; and this is particularly so where the relations of the parties have been materially changed, etc.' It never has been questioned, to our knowledge, that the death of one of the parties to the transaction is such a change."

And again:

> "Although a court of equity will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed *cestui que* trust, when the trust is admitted and there has been no adverse holding, lapse of time is no bar; 'any excuse for delay which takes hold of the conscience of the chancellor and makes it inequitable to interpose the bar is sufficient.' "

Laches cannot be presumed from delay alone. In Cox vs. Hall, 54 Mont. 154, 168 Pac. 519, the court said, on page 164:

> "We have repeatedly declared that though 'laches may arise from an unexplained delay short of the period fixed by the statute of limitations . . . still laches will not be presumed from such a delay alone. It must be made to appear affirmatively that unusual circumstances exist which on account of such delay render the proceeding inequitable; else relief cannot be denied on this ground.' (Brundy v. Canby, supra; Wright v. Brooks, 47 Mont. 99, 130 Pac. 968.) No such circumstances are presented here."

And in the case of Parchen vs. Chessman, 49 Mont. 326, 143 Pac. 631, at page 340:

> "Since it had been in the possession of the plaintiff, and had not been seen by the defendant, the latter could have had no knowledge that the mistake had been made until he ascertained the fact from the copy of the complaint served upon him. *Prima facie* this was sufficient to excuse his delay, for he was not required to act until he discovered that a mistake had been made. In any event mere delay is not sufficient ground for the imputation of laches. (Wright v. Brooks, 47 Mont. 99, 130 Pac. 968.)"

We call the court's attention to the statement of the rule as applied to laches in Montana, as set forth in the case of Hynes vs. Silver Prince Mining Company, 86 Mont. 10, 281 Pac. 548, at page 16, as follows:

> " 'Laches' has been defined as 'Such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and

other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' (10 Cal. Jur. 520.) Considered as a bar, independent of the statute of limitations laches means negligence in the assertion of a right; it is the practical application of the equitable maxim 'equity aids the vigilant,' and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable. (Riley v. Blacker, 51 Mont. 364, 152 Pac. 758.) It has been a recognized doctrine in courts of equity, from the very beginning of their jurisdiction, to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims. The doctrine of laches is based upon grounds of public policy which requires, for the peace of society, the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witnesses, or because, if living, the facts relating to the original transaction have faded from their memory or become obscured by lapse of time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is destitute of good faith, conscience and reasonable diligence.''

The Supreme Court of the United States recognizes principle in the case of Hammond vs. Hopkins, 143 U. S. 224, 36 L. Ed. 134, 12 Sup. Ct. Rep. 418:

> '' 'That a court of equity will not aid' a party whose application is destitute of conscience, good faith and reasonable diligence.''

We think it cannot be successfully urged here that the plaintiffs' application lacks either conscience, good faith or reasonable diligence.

10. Applying these well established rules to this case, the appellants knew that appellee's predecessors were furnishing water to the city of Missoula and its inhabitants and that the right to use the water of Rattlesnake Creek for such purpose was expressly decreed in Findings of Fact Nos. 3, 8, and 14, aggregating 705 miners inches. From the testimony it would seem that 700 inches were perhaps the maximum required for appellee's purposes until very recent years. The witness T. T. McLeod described the use for city purposes in the years immediately following the trial of Cause 1953, and down to about 1907 at less than 400 inches (Tr., 203). It is safe to assert that prior to 1908 the maximum flow was less than 400 inches. The improvements and the large expenditures of money made by appellee's predecessors for the enjoyment of their water rights were made during T. T. McLeod's management of the property. Having decreed rights for city water works purposes for more than 700 inches, greatly in excess of the maximum used, might it not be fairly presumed by the other appropriators that the improvements and expenditures in question were made with the intention of the water company to use its decreed rights, and to use the appropriations which it had been decreed for the purpose which it had the right to use them? Were other appropriators to presume that the water company would allow the rights decreed for water works purpose to go to waste and an unlawful use made of another right? We earnestly urge that the water company must be presumed to have

made the expenditures and improvements referred to with the intention of using the water rights which it had the right to use, and without the intention to trespass upon the rights of the appellants. Accordingly and for many years after that time, the predecessors of these appellants enjoyed their decreed water as distributed by the water commissioner. They cultivated their lands, irrigated their crops and, generally speaking, were prosperous. Prior to 1931 (except in the case of Tucker for which appropriate compensation was paid) appellee's predecessors seemed not guilty of excessive invasion of the rights of appellants' predecessors. In fact, under the rule in Zosel vs. Kohrs, a cause of action did not accrue prior to 1931.

11. Furthermore, it is not claimed, neither pleaded nor proven, that the operation of its water rights by defendants' predecessors has not always been highly profitable and enjoyable. It is not claimed that the improvements made and expenditures of money were on account of the expectation of being permitted to change the place of diversion of Rights 1, 2 and 9. The fair inference is that the expenditures and improvements made, were made because of the right, undisputed, to use water rights 3, 8 and 14 for water works purpose. There is not a particle of testimony to indicate that appellee's predecessors ever actually needed to divert rights 1, 2 and 9 at the "Dam" in order to sufficiently supply Missoula and its inhabitants with water.

Furthermore, there is no serious claim that ap-

pellee will not use and enjoy its improvements and water works enterprise to the fullest extent by receiving its Rights 3, 8 and 14. This case fails to show any need of defendant to divert any part of right 1, 2, or 9 at the "Dam." In fact the fair inference from the tetimony is positive that Rights 3, 8 and 14 at the "Dam" are ample for its needs.

In deciding the case in the court below, the Honorable Judge makes no reference to the pretended defenses of laches, or that appellants' rights may be barred by the running of any statute of limitations; the Honorable Judge expressly states, however, that he ignores *nonessentials of strategy, camouflage, and nuisance-value,* and we may assume that these so-called defenses are included in this category and merit no mention. The same are discussed in this brief in anticipation of appellee's claims in respect thereto but in view of the same being eliminated by the court below, we feel that the discussion is not important and that further discussion of the subjects is unnecessary.

SPECIFICATION OF ERRORS 1, 2, 3, 4

12th. The Honorable Judge of the court below found no difficulty in determining the facts in this case in favor of appellants in their claim that appellee had transgressed the privilege extending by Section 7095, and that appellants are prejudiced by the attempted change of point of diversion; appellants' grievance is expressed as *clear, plain as a pike staff.* The court below calls attention to the fact that the

decree of 1903 was a decree of the state court and enjoins all parties from transgresing upon the rights of all others. The state court retains jurisdiction to enforce the decree, apportion the water and supervise its use by its officer (water commissioner).

From that the court decides that any trespasses upon, or violation of, the rights involved must forever remain a subject of jurisdiction by the state court. The important question to be determined in this appeal is the correctness of this holding in the trial court.

Article III of the Constitution of the United States provides that the judicial power of the United States shall extend to all cases in *law and equity arising between citizens of different states.* The necessary diversity of citizenship and value in controversy is alleged and admitted (Tr., 3, para. I; Tr., 60, para. I). The constitutional provision is carried out by USCA Title 28, Section 41. Thus, unless precluded by the fact that the state court adjudicated the extent and priority of the appropriations of the several users and that the state court continues by its officer (water commissioner), to apportion the water each year and, to some extent, supervise its use, then appellants have clearly shown their right to have this court take heed of their complaint and grievance.

A water right in Montana is a form of property recognized by the laws of the state.

Section 7093, Rev. C. 1921;

Wiel on Water Rights, Chap. 2, Page 14;

Toohey vs. Campbell, 24 Mont. 13, 60 Pac. 396;

Conrow vs. Huffine et al., 48 Mont. 437, 138 Pac. 1094;

Thorpe vs. Freed, 1 Mont. 651;

Mettler vs. Aimes Realty Co., 61 Mont. 152, 201 Pac. 702;

Smith vs. Denniff, 24 Mont. 20, 60 Pac. 398;

Moore vs. Sherman, 52 Mont. 542, 159 Pac. 966.

"The right acquired by Miller by virtue of his appropriation in 1892 was property. It continued to be property to the time of his death and passed to his successors."

Such property right has its inception in the making of a valid appropriation in form prescribed by law, Section 7094, Rev. C. 1921, Bailey vs. Tintinger, 45 Mont. 154, 122 Pac. 575. The rule is that first in time is first in right, Section 7098, Rev. C. 1921. The property right originates because of the appropriation and not by virtue of the decree.

Bennett vs. Quinlan, 47 Mont. 247, 131 Pac. 1067;

Whitcomb vs. Murphy, 94 Mont. 562, 23 Pac. (2nd) 980.

An adjudication such as was accomplished in Cause No. 1953 is intended only and has the effect only of prescribing and defining the rights actually acquired by the appropriator by virtue of his appropriation, and the relationship of such rights to one another, Section 7105, Rev. C. 1921.

13th. It is true that the court, by virtue of the statute, retains, in a sense, authority over the area and water flowing, by its officer (water commissioner) for the distribution of the water. Section 7136, Rev. C. 1921 to 7159 inc., amended by Chapter 125 of the 19th session, 1925. But the duties of the water commissioner are purely ministerial and in no sense judicial.

Gans and Klein Invest. Co. vs. Sanford, et al., 91 Mont. 512, 2 Pac. (2nd) 808.

This action involved a complaint of the distribution made by the water commissioner under Section 7150 as amended by Chapter 125, Laws of 1925. The court say:

> "The only pleading required by section 7150, as amended, supra, is the written complaint of a water user who is dissatisfied with the manner in which the commissioner is distributing the water. The method prescribed is a simple one: A person deeming himself injured by the actions of the commissioner lodges with the judge (or files with the clerk) a written complaint, upon which the judge fixes a time for hearing, directing that 'such notice be given to the parties interested in such hearing as the judge may deem necessary.' At the time fixed the judge hears and examines the complainant and such other parties as may appear to support or resist the claim, as well as the water commissioner and other witnesses as to the charges contained in the complaint. The sole question for determination is whether the water commissioner has been distributing the water to the respective users in accordance with the decree. It is possible that in time of low water the judge

> may be obliged to hear a number of complaints under this section of the statute during an irrigation season. The statute does not contemplate that a formal trial framed upon pleadings filed by the respective parties, shall result from the mere filing of a complaint. Supposedly when a water right suit ends in a final decree, all of the issues contemplated therein are adjudicated. The decree is not merely a basis for a new procession of water suits. In the administration of the decree it may happen for one reason or another that the water commissioner may need directions from the judge respecting the distribution of the water."

In practice, that we must all be aware that the water commissioner (commonly designated as ditch tender) is not a person learned in the rules covering the ownership and rights to property, nor skilled in deciding upon such rights. Generally speaking, he is of the unfortunate type who is favored with a passing job because he has neither the physical nor mental ability to retain steady work. It is not to be considered for a minute that the decision of so important a question as, for instance, the right to change the point of diversion of the appropriation, such as is claimed by appellee for the Mill Ditch, or either the Higgins Ditch, must first be made by the water commissioner. To suggest the submission of so important a matter to the water commissioner for decision is only making ridiculous the administration of law. Clearly, the water commissioner's function is to distribute the flow of the stream in the amount and of the priority outlined in the decree, any changes that may occur in the

volume of the flow, the place of diversion, the necessities of the appropriators and similar questions are the subject of judicial inquiry to be determined by the courts and not to be decided in the first instance by the water commissioner.

Boulder & Left Hand Ditch Co. vs. Hoover Water Commissioner (Col.), 110 Pac. 75.

holds duties of water commissioner ministerial, not judicial:

> "never was in contemplation that they should examine the burden of litigation because of dispute between the several water claimants, with reference to their respective rights under decrees duly rendered and enforced." "If plaintiff, when the water is turned out to him makes an improper use thereof applying it unlawfully to another land, or otherwise wrongfully uses it, in a way to injure the fixed rights of others interested in the same source of supply, then such wrong is subject to correction *in a suit by the one damnified.*"
>
> Rosenkrantz vs. Barde (Ore.), 214 Pac. 889; Parchall vs. Cooper, 22 Wyo. 385, 134 Pac. 302.
>
> "by, not exercising that duty, (referring to distribution of water as water commissioner) *he has no authority to determine whether or not a water right has been forfeited or amended, or to prevent an appropriator from taking the full quantity of water awarded by the board of control.*"

In 40 Cyc. 730, the rule is stated that a court of equity may adjudicate and determine the extent of

rights in water flowing in natural streams and to regulate the use of the flow by the appropriator and the jurisdiction of the Federal Court is recognized where requisite diversity of citizenship exists. Injunction proper remedy, 40 Cyc. 738. Assertion of adverse claim sufficient to justify quiet title, 40 Cyc. 729.

Without discussion the court upheld right to maintain suit such as this in:

Thrasher vs. Mannix & Wilson (Mont.), 26 Pac. (2nd) 370,

and in Donich vs. Johnson, 77 Mont. 229, 250 Pac 963, where a suit for permission to establish reservoir site on stream entertained.

Bennett vs. Quinlan, 47 Mont. 247, 131 Pac. 1067:

> "As appears from the foregoing statement, it is alleged therein that the plaintiff is the owner of the property described, that defendant claims an interest therein adverse to that of plaintiff, and that such claim is without right. This is sufficient to put the defendant upon his defense. (Mont. Ore Pur. Co. v. Boston & Mont. C. etc. Co., 27 Mont. 288, 70 Pac. 1114; Merk v. Bowery Min. Co., 31 Mont. 298, 78 Pac. 519; Castro v. Barry, 79 Cal. 443.)"

14th. Wherever the question has arisen the courts (including Montana) have uniformly held that the right to the use of water flowing in a stream acquired by virtue of an appropriation is of such dignity and importance that in case of trespass upon it, or transgression against it, the owner of the right is not limited in his remedy to first appealing to a water commissioner but may appeal to any court of competent

jurisdiction, the same as he might do for the protection, or preservation, of any other property or personal rights. In providing for a water commissioner to distribute the water of an adjudicated stream and in permitting a complaint to be made for his wrongful distribution, it was intended to provide *an additional remedy, not an exclusive remedy.* And it is expressly held that the property owner, at his election, may enter a court of competent jurisdiction and seek and obtain the necessary protection of his right and the courts will entertain such a suit.

Tucker vs. Missoula L. & R. Co., 77 Mont. 91, 250 Pac 11;

Buskirk vs. Red Butte Co., 24 Wyo. 183, 156 Pac. 1122, 160 Pac. 387.

Appellants' Brief, same case, page 64, citing:

Allen vs. Houn (Wyo.), 219 Pac. 573, para. 9;

Maize vs. Dist. Court for Butte County, Idaho, 200 Pac. 115.

15th. Apply the foregoing principles to the situation now before the court. In litigation commenced in 1901 in the Montana Court, having jurisdiction of the res, a decree was rendered in 1903. The amounts and relative priorities of all appropriations from Rattlesnake Creek were adjudicated. The plaintiff in that action, appellee's predecessor, claimed large appropriations aggregating 4200 inches for *mechanical, agricultural, domestic* and other useful and beneficial purposes but not alleging any change of point of di-

version nor asking permission to make such change. Upon issue formed by the various answers and upon evidence given upon trial the court found as fact that plaintiff's predecessors had appropriated, (a), 946 inches for mechanical power and other purposes by the Mill ditch, (b), 160 inches by the Higgins ditch, and, (c), 348 inches more by the Higgins ditch. There is no pleading whereby the court would have had the right to pass upon the question of a change of point of diversion nor is there any suggestion that the court did actually attempt to nor give any right to change the point of diversion. In 1931 the previous doubtful rumblings of such an intention became an open declaration that appellee had changed the point of diversion of Mill ditch and Higgins ditch appropriations to the "Dam" and thenceforth and regardless of the effect such transfer might have upon the appropriations of appellants, it proposed to divert these appropriations at the "Dam." As is stated by the Honorable Judge who tried the cause, appellants thereby are justified in complaining, their grievance and injury is real and substantial which result is *plain as a pike staff*. The prescribed amount in controversy and diversity of citizenship being present, are the doors of the courts of the United States closed to appellants in which they may complain of the injury thus inflicted upon them? The Honorable Judge of the court below, without suggestion from counsel for appellee and without argument nor reference to authority, so decided. The decisions referred to by him do not sustain the view ex-

pressed, nor can authorities be found that will sustain such view.

The rule is that a federal court may not take jurisdiction because the same litigation is pending in a state court applies only where the parties to, the subject-matter of, and the relief sought in the suit in the federal court are identical with that in the state court.

15 C. J. 1163, para. 638.

Buck vs. Colbath, 3 Wall (U. S.) 334, 18 L. Ed. 257:

> "It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits."

Appellants here are successors of some, but not all, of defendants in Cause No. 1953. They join here in asking relief against appellee's encroachment but their joining is a mere incident, any one of them would have had the right to maintain the action alone. Such being the case, it can scarcely be asserted that there is an identity of parties in this action with the parties in Cause No. 1953. Likewise, the relief sought is wholly different in this case than it was in the former

case. That case was strictly an adjudication of the stream to determine relative priorities and amounts of appropriations; this case is to restrain an encroachment upon appellant's rights by changing the point of diversion. The reference, in this case, to the water rights of the various parties by the decreed number is likewise merely incidental and a matter of convenience. All such rights, as we have seen, were initiated by appropriation and not by the decree and our reference to them by decree number is only because of the convenience of so doing.

Knuth vs. Lepp (Wis.), 193 N. W. 519;

Lippke vs. Portable Milling Co. (Ia.), 244 N. W. 845;

C. T. C. Invest. Co. vs. Daniel Boone Coal Corporation, 58 Fed. (2d) 305;

Carter vs. Blaine Co. Invest. Co., 45 Fed. (2d) 643;

Hunt vs. New York Cotton Exchange, 27 Sup. Ct. Rep. 529;

Ingersoll as admx. vs. Coram, 29 Sup. Ct. Rep. 92;

Watson vs. Jones, 13 Wall 679, 20 L. Ed. 666.

"But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties or, at least, such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief

> sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties."

The case of Pacific Livestock Co. vs. Lewis, et al., 36 Sup. Ct. Rep. 637, seems to be on all fours with the present case. In that case, the purpose and effect of an adjudication of water rights is reviewed and defined. The distinction between such an adjudication and a case such as this is pointed out. The opinion in that case by Justice Van Devanter seems unanswerable and clearly holds that the United States Court, under the circumstances, should not dismiss a case such as this but should decide the same upon the merits.

SPECIFICATION OF ERRORS 5, 6, 7

16th. The discussion foregoing covers anything that might be said as to these specifications of error and the same are submitted without further reference.

FINAL DISPOSITION OF THE CASE

17th. Having shown that the court below, after clearly deciding the matters in issue in favor of appellants, denied them relief because of the erroneous belief that the court should not entertain the complaint, the question presents itself as to the disposition that now should be made of the case. Being an equity suit,

the whole case is before the court and the same should be decided *de novo* on its merits.

Wong Keow vs. U. S., 215 Fed. 95;
Waterloo Min. Co. vs. Doe, et al., 82 Fed. 41;
Unkle vs. Wills, 281 Fed. 29, 34;
Idaho M. & M. Co. vs. Davis, 123 Fed. 396;
Columbia Graphophone Co. vs. Searchlight Horn Co., 236 Fed. 135, 9;
Vineyard L. & S. Co. vs. Twin Falls Oakley L. & W. Co., 245 Fed. 30, 33.

If it can be said that there is any conflict in the testimony (and there is actually very little conflict) then all such conflict has been resolved by the trial judge in favor of appellants and the decision of the trial judge in respect to the evidence is persuasive and presumptively correct.

Presidio Min. Co. vs. Overton, 270 Fed. 388;
Pac. Amer. Fish. vs. Hoff, 291 Fed. 306;
Conqueror Trust Co. vs. F. & D. Co. of Maryland, 63 Fed. (2d) 833, 7;
Woods-Faulkner & Co. vs. Michelson, 63 Fed. (2d) 569, 70;
Clements vs. Coppin, 61 Fed. (2d) 552, 7;
McCullogh vs. Penn. Mut. Life Ins. Co. of Phila., 62 Fed. (2d) 831;
U. S. Etc. vs. McGowan, 62 Fed. (2d) 955;
Collins, et al., vs. Finley, 65 Fed. (2d) 625.

For the reasons foregoing, appellants respectfully submit that the judgment should be reversed and a

judgment in favor of appellants for the relief prayed for should be ordered.

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APPENDIX

Section numbers hereinafter set forth refer to Revised Codes of Montana 1921, unless otherwise specified.

7093. *What waters may be appropriated.* The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

7094. *Appropriation must be for a useful purpose.* The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

7095. *Point of diversion may be changed.* The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

7105. *Rights settled in one action.* In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, plaintiff may make any or all persons who have diverted water from the said stream or source, parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdicts, and judgment thereon may be entered for or against one

or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves. In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same kind is asked by parties to the action, the court shall hear and determine such controversy as if the same were several as well as joint.

7128. *Effect of decree upon subsequent appropriations.* Whenever there shall have been an adjudication of the rights between appropriators or claimants to any stream or any other water supply in this state, in any district court of the state, or the United States court, in an action prosecuted in good faith between such appropriators or claimants to determine their respective rights to the use of such waters, and which decree is based upon evidence introduced, and not upon stipulations or admissions of the parties, such adjudication and decree, or certified copies thereof shall, as against all persons appropriating or diverting any of the waters of the said stream or other water supply, after the date of such decree, in an action relating to such waters, be prima facie evidence of the facts therein found, determined, and decree, respecting the rights of parties to said action to the use of the waters of said stream or other water supply.

Sections 7136, 7140, and 7150 as amended by Chapter 125, Laws of the Nineteenth Session of the Legislative Assembly 1925.

"Section 7136. Appointment of Water Commissioners. Whenever the rights of persons to use the waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply have been determined by a decree or decrees of a court of competent jurisdiction. it shall be the duty of the judge of the district court having jurisdiction of the subject mat-

ter, upon the application of the owners of at least ten per cent of the water rights affected by the decree or decrees, in the exercise of his discretion, to appoint one or more commissioners, who shall have authority to admeasure and distribute to the parties bound by the decree or decrees the waters to which they are entitled, according to their rights as fixed by such decree or decrees. At the time of the appointment of any water commissioner or water commissioners, his or their fees and compensation must be fixed in the order."

"Section 7140. Power of Commissioners in Admeasuring Water Expenses. Every water commissioner appointed by the judge of the district court for that purpose shall have the authority to admeasure and distribute to the parties interested, under such decree or decrees, the water to which those who are parties to the decree or decrees, or privy thereto, are entitled according to their priority as established by the decree or decrees. The water commissioner, in case the parties fail or refuse to do so, may incur necessary expenses in the making of headgates or dams for the distribution of the waters, and such expense shall be assessed against and paid by the party or parties for whom such services in the repair of the ditch or ditches, and the making of any dams or headgates, were necessary. Provided, that in the discretion of the court, such costs or expenses may be assessed against the land upon which or for the benefit of which such expense had been incurred."

"Section 7150. Complaint by Dissatisfied User—Procedure. Any person owning or using any of the waters of such stream or ditch or extension of ditch, who is dissatisfied with the method of distribution of the waters of such stream or ditch by such water commissioner or water commissioners, and who claims to be entitled to more water than he is receiving, or is entitled to a right

prior to that allowed him by such commissioner or water commissioners, may file his written complaint, duly verified, setting forth the facts of such claim. Thereupon the judge shall fix a time for the hearing of such petition, and shall direct that such notice be given to the parties interested in such hearing as the judge may deem necessary. At the time fixed for such hearing, the judge must hear and examine the complainant and such other parties as may appear to support or resist such claim, and also examine such water commissioner or water commissioners and witnesses as to the charges contained in said complaint. Upon the determination of the hearing, the judge shall make such findings and order as he may deem just and proper in the premises. If it shall appear to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, then the judge shall give the proper instructions for such distribution. The judge may remove such water commissioner or water commissioners and appoint some other person or persons in his or their stead, if he deems that the interests of the parties in the waters mentioed in such decree will be best subserved thereby, and if it shall appear to the judge that the said water commissioner or water commissioners have wilfully failed to perform their duties, they may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make such order as to the payment of costs of such hearing as may appear to him to be just and proper."

9015. *Seizin within ten years—When necessary in actions for real property—Action for dower.* No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within ten years

before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten years after the death of her husband.

9041. *Actions for relief not hereinbefore provided for.* An action for relief not hereinbefore provided for must be commenced within five years after the cause of action shall have accrued.